Supreme Court, U.S.
FILED
DEC 7 - 2004
OFFICE OF THE CLERK

(2)

No. 04-516

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2004

LESHIA DONALDSON, ET AL.,

Petitioners,

v.

LEON LOTT, RICHLAND COUNTY SHERIFF, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Andrew F. Lindemann - Counsel of Record
DAVIDSON, MORRISON & LINDEMANN, P.A.
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

ATTORNEYS FOR RESPONDENTS

TABLE OF CONTENTS

Table of Authorities ii

Reasons for Denying The Petition 1

Conclusion 9

TABLE OF AUTHORITIES

Cases

Doe v. Groody, 361 F.3d 232 (3d Cir. 2004). 4

Guy v. Wisconsin, 509 U.S. 914 (1993). 2

Marks v. Clarke, 102 F.3d 1012 (9th Cir. 1996). 3

Maryland v. Buie, 494 U.S. 325 (1990). 2

Michigan v. Summers, 452 U.S. 692 (1981). 2

Owens v. Lott, 372 F.3d 267 (4th Cir. 2004)..... 1

Saucier v. Katz, 533 U.S. 194 (2001). 7

State v. Guy, 172 Wis. 2d, 492 N.W.2d 311 (1992). 2

Terry v. Ohio, 392 U.S. 1 (1968). 2

United States v. Grogins, 163 F.3d 795 (4th Cir. 1998). 3

United States v. Kennedy, 32 F.3d 876 (4th Cir. 1994). 3

United States v. White, 875 F.2d 427 (4th Cir. 1989). . 3

Williams v. Kaufman County, 352 F.3d 994 (5th Cir 2003). 5

Wilson v. Layne, 526 U.S. 603 (1999). ..... passim

Wilson v. Layne, 141 F.3d 111 (4th Cir. 1998). 7

Ybarra v. Illinois, 444 U.S. 85 (1979). ..... passim

REASONS FOR DENYING THE PETITION

I. The circuit conflicts cited by the Petitioners are insignificant, if they exist at all, and as a result, a writ of certiorari is not warranted.

The Petitioners maintain that this case presents this Court the opportunity to resolve two circuit conflicts. The Respondents disagree for several reasons. First, as to be discussed further below, any perceived conflict in the reading and application of footnote four contained in this Court's decision in *Ybarra v. Illinois*, 444 U.S. 85 (1979), does not warrant a writ of certiorari to be issued in this case. Furthermore, in the event that the circuit conflicts presented by the Petitioners are viewed as critical, this is clearly not the case for a resolution of those conflicts or to answer any unresolved questions from *Ybarra* due to the current posture of the case.

Addressing the second point initially, it is important for this Court to focus on the fact that the unconstitutionality of the "all persons" search warrant at issue has not been conclusively determined -- despite the assertion to the contrary by the Petitioners. The district court did not address the constitutionality of the searches by way of trial or even on cross motions for summary judgment. Instead, the Respondents alone moved for summary judgment, and as a result, all facts have been *to this point* viewed in a light most favorable to the Petitioners. The Fourth Circuit recognized that it was not deciding the unconstitutionality of the search warrant as a matter of law. Instead, the Court "decide[d] whether the facts, *viewed in a light most favorable to plaintiffs*, establish that defendants' search of plaintiffs pursuant to the 'all persons' language in the warrant was unreasonable under the Fourth Amendment." *Owens v. Lott*, 372 F.3d 267, 273 (4th Cir. 2004). (Emphasis added). Thus, even though the district court and the Fourth Circuit found that the "all persons" language was unconstitutional, it did not make that determination as a matter of law. The legality of the warrant and whether probable cause exists for the issuance of that warrant are issues remaining to be litigated.

Consequently, the Petitioners are flat wrong when they

maintain that "both courts below squarely held that the 'all persons' search in this case was unconstitutional." *See*, Petition for Writ of Certiorari, p. 28. Those courts were only viewing the evidence in a light most favorable to the Petitioners and, in fact, were troubled by the paucity of facts contained in Deputy Maldonado's warrant application. There was no testimony or evidence presented at summary judgment by affidavit or deposition as to the additional information, if any, as was provided orally to the issuing magistrate when the warrant was sought. That testimony will need to be developed in future proceedings, which as the case currently stands, will take place in state court in adjudication of the remaining state law claims that were remanded by the district court to state court. Pet App. 21a. Because the existence of probable cause or lack thereof has not been conclusively determined, this case is not an appropriate avenue for this Court to attempt to resolve the perceived circuit conflicts cited by the Petitioners.

Moreover, given the posture of this case, both the district court and the Fourth Circuit did not find it necessary to address whether the searches were constitutional in spite of the alleged illegality of the "all persons" language contained in the warrant. The courts below ruled, based on the evidence taken in a light most favorable to the Petitioners, that the searches were not supported by individualized probable cause. Yet, as the Respondents continue to maintain, the searches were constitutional even in the absence of probable cause. Even if probable cause did not exist for the searches of these persons, it has been conceded that probable cause, as determined by a neutral and detached magistrate, did support the search of the premises itself. As a result, the frisk searches in execution of the search warrant were constitutionally permitted for purposes of ensuring officer safety. *See*, *Michigan v. Summers*, 452 U.S. 692 (1981); *Maryland v. Buie*, 494 U.S. 325 (1990).

The constitutionality of the searches in the present case, and in particular the frisk search of William Clayton, is supported by the case of *State v. Guy*, 172 Wis. 2d, 492 N.W.2d 311 (1992), *cert. denied*, 509 U.S. 914 (1993). That case is particularly significant given that this Court denied certiorari, with Justices White and Thomas dissenting. *See*, *Guy v. Wisconsin*, 509 U.S. 914 (1993). In that case, the Wisconsin Supreme Court concluded that an officer's frisk of a person present during the execution of a narcotics search

warrant was constitutional under *Terry v. Ohio*, 392 U.S. 1 (1968) and its progeny. The court found that, given the nature of a search for narcotics and the violence typically associated with drug trafficking, it was reasonable for a police officer to conduct a search for weapons.[1] Justices White and Thomas also recognized that "[o]ther state courts have upheld patdown searches of persons encountered during the execution of a narcotics search warrant in a private residence on the same rationale [as the Wisconsin court]." *Guy*, 509 U.S. at 914.

Clearly, the extent of the search of William Clayton was a patdown for weapons, which would certainly be constitutional under *Terry*. Moreover, the scope or extent of the searches of the three female Petitioners remains in dispute. Deputy Kight testified that no clothing was removed, and she described the searches as "frisk searches." The courts below construed the searches as "strip searches" because the evidence on summary judgment must be viewed in a light most favorable to the Petitioners as the non-moving parties. Yet, as this discussion shows, there remain issues of fact in dispute on the ultimate issue of the searches' constitutionality that will make it very difficult for this Court to clearly and cleanly resolve any perceived circuit conflicts.

With that said, the Respondents further submit that there is no substantial conflict that requires this Court's intervention. The Ninth Circuit in *Marks v. Clarke*, 102 F.3d 1012 (9th Cir. 1996), reads the *Ybarra* decision as setting forth a clearly established rule that a search warrant must be supported by probable cause: There is no disagreement from the Fourth Circuit or the Respondents to

---

[1] The Fourth Circuit has likewise found that there is a strong correlation between drugs and the presence of weapons. *See*, *United States v. Grogins*, 163 F.3d 795, 799 (4th Cir. 1998) ("the connection between illegal drug operations and guns in our society is a tight one"); *United States v. White*, 875 F.2d 427, 433 (4th Cir. 1989) ("it is not unreasonable to recognize that weapons have become tools of the trade in illegal narcotics operations"); *United States v. Kennedy*, 32 F.3d 876, 882 (4th Cir. 1994) ("the law has uniformly recognized that substantial dealers in narcotics possess firearms and that entrance into a situs of drug trafficking activity carries all too real dangers to law enforcement officers").

that proposition. However, the *Ybarra* Court did not address whether an "all persons" search warrant where the persons are unnamed is constitutional and, if so, under what circumstances. That was the point made by the Fourth Circuit in applying the qualified immunity analysis in this case. There is no dramatic or significant conflict identified here. It is clear that this Court in *Ybarra,* in fact, carefully limited the scope of its decision as follows:

> Consequently, we need not consider situations where the warrant itself authorizes the search of unnamed persons in a place and is supported by probable cause to believe that persons who will be in the place at the time of the search will be in possession of illegal drugs.

444 U.S. at 92, n.4. Thus, the *Ybarra* decision does not determine whether an "all persons" search warrant is constitutional or not where the authorization to search unnamed persons present is included on the warrant, which is the scenario in the present case. Moreover, this Court clearly did not address in *Ybarra* what is required to show probable cause for such an "all persons" search warrant.

Of course, it is ironic that the Petitioners' argument that the Fourth Circuit's and Ninth's Circuit's interpretations of footnote four of the *Ybarra* decision are "irreconcilable" and create a conflict worthy of a writ of certiorari. For, if the distinguished judges of those two courts cannot agree on what the footnote proclaims as the applicable law, it only demonstrates that the law is not clearly established such that a reasonable law enforcement officer in the position of Deputy Maldonado should understand the holding of *Ybarra.* As this Court aptly observed in *Wilson v. Layne,* 526 U.S. 603 (1999), "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." 526 U.S. at 618. The alleged circuit conflict cited by the Petitioners only serves to confirm that the Respondents are entitled to qualified immunity because the applicable law was not clearly established.

The Petitioners also suggest that there is a circuit conflict between the Fourth Circuit and the Third and Fifth Circuits. The

Respondents respectfully disagree. The Third Circuit case of *Doe v. Groody*, 361 F.3d 232 (3d Cir. 2004), is easily distinguishable from the present case. In *Doe*, the warrant application sought the authority to search "all occupants" of a suspected drug house, but in issuing the warrant, the magistrate only permitted the search of a single, identified individual (given the name "John Doe" in the opinion). The warrant did not authorize the search of "all persons" nor did it authorize the search of John Doe's wife and child, who ultimately were strip searched during the execution of the warrant. Hence, the facts alone demonstrate that there is no conflict between the Fourth Circuit and the Third Circuit. Moreover, the Petitioners' suggestion that the denial of qualified immunity in *Doe* suggests that the Third Circuit would not have granted qualified immunity in the present case is unfair as well as speculative. The *Doe* court denied qualified immunity because it was clear that the warrant did not authorize the searches of two persons not named in the warrant *and* because it was clear that police could not broaden the scope of a warrant with an unincorporated affidavit. Obviously, the qualified immunity analyses in *Doe* and in the present case are not remotely similar.

As for the perceived conflict with the Fifth Circuit, the Respondents do not read *Williams v. Kaufman County*, 352 F.3d 994 (5th Cir 2003), as being in conflict with the Fourth Circuit's opinion in the present case. Like *Doe*, as discussed above, *Williams* is factually distinguishable from the present case. There, as in *Doe*, the warrant did not authorize the searches of "all persons" present at the execution of the warrant. The warrant expressly allowed for the "seizure" -- not search -- of each suspected party named in the warrant affidavit. None of the plaintiffs, however, was named as a suspect in the warrant affidavit. Moreover, as in *Ybarra*, the search warrant was for a public place -- a night club -- and not for a private residence as in the present case. Consequently, the facts of *Williams* were on point with *Ybarra* so as to preclude qualified immunity for the searches of the night club patrons not named in the warrant.

In sum, the Respondents disagree with the Petitioners' suggestion that the Fourth Circuit's decision in this case is at odds with decisions of other circuits. Accordingly, it is submitted that a writ of certiorari is not warranted. Even if further analysis of the *Ybarra* decision is needed or this Court finds it prudent to weigh in on the constitutionality of "all persons" search warrants, this case -- as opposed to a criminal case -- is not in the best posture for such a

determination given the material issues of fact remaining in dispute and the incomplete record of which the Fourth Circuit complained.[2]

II. This Court has already provided guidance on the role of out-of-circuit authority in determining whether the law is clearly established for purposes of a qualified immunity analysis, and as a result, a writ of certiorari is not warranted.

As a secondary issue, the Petitioners ask this Court to grant certiorari to address the role of out-of-circuit authority in determining whether the law is clearly established for purposes of a qualified immunity analysis. In making this argument, the Petitioners suggest that the approach by the Fourth Circuit was erroneous. In actuality, the rule applied by the Fourth Circuit in this very case is consistent with existing precedent of this Court. In *Wilson v. Layne*, 526 U.S. 603 (1999), a case which originated in the Fourth Circuit, this Court affirmed the grant of qualified immunity. This Court explained that,

> Petitioners have not brought to our attention any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely, nor have they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.

526 U.S. at 617. Consequently, this Court previously adopted the same approach applied by the Fourth Circuit in the case at bar. To determine whether the law is clearly established, the Court looks first to the controlling authority within the relevant jurisdiction. In the absence of such controlling authority within that jurisdiction, the law may be deemed clearly established *only if* there exists a "consensus of cases of persuasive authority" from other

---

[2] It bears repeating that the material issues of fact in dispute did not preclude summary judgment on the qualified immunity defense only because even with the evidence viewed in a light most favorable to the Petitioners, the Respondents were entitled to summary judgment.

jurisdictions. The requirement of a consensus is crucial -- unless there is such a consensus it cannot be said that the unlawfulness of the officer's actions was apparent.

Importantly, in *Wilson, supra*, this Court affirmed the decision of the Fourth Circuit. In *Wilson v. Layne*, 141 F.3d 111 (4th Cir. 1998), the Fourth Circuit held that "[t]he law is clearly established such that an officer's conduct transgresses a bright line when the law has been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state." 141 F.3d at 114. That is the same approach taken by the Fourth Circuit in the present case. Consequently, it is not necessary for this Court to grant certiorari only to reaffirm what has already been stated by this Court in *Wilson*.

The Petitioners also maintain that there is split of authority as to how the circuits apply the "consensus of cases of persuasive authority" from other jurisdictions. They suggest that the Fourth Circuit, unlike other circuits, looks at the legal test to be employed and not the ultimate outcome of the legal tests. This contention represents nothing more than a misunderstanding of the Fourth Circuit's ruling in the present case. The Petitioners fail to recognize that the different legal tests for determining if probable cause exists to support an "all persons" search warrant can and do effect the ultimate outcome. Prior to this case, neither the Fourth Circuit nor the South Carolina appellate courts had had the opportunity to address the constitutionality of an "all persons" search warrant or the showing required for the issuance of an "all persons' search warrant. Moreover, none of the courts providing controlling authority for South Carolina had previously determined the propriety of "all persons" search warrants and, in particular, the use of such warrants with respect to a residence where suspected drug activity was occurring. Thus, where as here the proper legal test effects the outcome, it was entirely appropriate for the court to focus on the fact that the legal test to be applied is not clearly established in determining that qualified immunity is appropriate.

The Petitioners have also overlooked that "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*

v. Katz, 533 U.S. 194, 202 (2001). In the absence of controlling authority, an objectively reasonable officer in Deputy Maldonado's position could have believed that probable cause existed for the search of all persons found on the premises. Each of the persons who were searched had a substantial connection to the premises. They did not appear to be present only by happenstance. The illegal drug activity witnessed by the informant had very recently occurred. The warrant was executed on the same day as the criminal activity was observed. The premises was a small, private residence, and none of the Petitioners were mere transitory visitors. Deputy Maldonado knew that the cocaine was being sold in an expeditious manner. Consequently, it was reasonable, although perhaps mistaken, to believe that the residents were involved in or had knowledge of the criminal activity so as to warrant the searches.

Moreover, it may not be ignored that a judicial officer had issued the "all persons" warrant in question, which also reinforces the Respondents' entitlement to qualified immunity. There is no suggestion that the magistrate who issued the warrant was provided false or incomplete information; yet, based on the very same information on which Maldonado relied, the magistrate issued the warrant and authorized the searches of all persons present at the execution of the warrant. The fact that the warrant was issued compels the conclusion that the law was not clearly established at that time and that the Respondents could not have reasonably known that their conduct in executing the warrant was unlawful.

CONCLUSION

For the foregoing reasons, the Respondents submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DAVIDSON, MORRISON &
LINDEMANN, P.A.

BY: _____

ANDREW F. LINDEMANN
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

ATTORNEYS FOR RESPONDENTS

Columbia, South Carolina
December 7, 2004